Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

BENEDETTO ALOI and

VENERO MANGANO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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58 pp

QUESTIONS PRESENTED

In *United States v. Watts*, __ U.S. ___, 117 S.Ct. 633 (1997), this Court upheld the use under the Sentencing Guidelines of acquitted conduct if proven to a court's satisfaction by only a preponderance of the evidence. However, pointing to, *inter alia*, *United States v. Gigante*, 39 F.2d 42, 48 (2d Cir. 1994), *as amended*, 94 F.3d 53, 56 (2d Cir. 1996), this Court specified that it was not reaching the question whether the same standard is legally or Constitutionally acceptable when the acquitted or uncharged conduct "dramatically increase[s] the sentence", or whether in these circumstances such conduct must be proven by "clear and convincing evidence".

The instant case *is* the *Gigante* case to which the Court pointed. Petitioners' Guideline base levels for the only offenses of conviction (they were acquitted of 67 out of 19 counts) would have yielded a sentence range of 27-33 months. After departures, Petitioners Mangano and Aloi were sentenced to 188 and 200 months respectively. Moreover, the sole "evidence" underlying the findings deemed to justify these enormous departures was hearsay within hearsay--all inadmissible where the rules of evidence would apply. The questions raised are:

1. Whether sentences of 200 and 188 months (for petitioners Aloi and Mangano respectively) can stand when the Guideline base levels for the only offenses of conviction (extortion and extortion conspiracy) would have been 27-33 months, and when the departure is founded solely on hearsay "evidence", given that the defendants were acquitted of 67 counts of the 69-count indictment (including the RICO counts). (Holding that "Appellants' argument is not without force"

because "the preponderance standard is no more than a tie-breaker dictating that when the evidence on an issue is evenly balanced ...", the Court of Appeals nonetheless upheld the hugely enhanced sentences.

2. The Petition also raises the issue whether the *nature* of the proof deemed sufficient here—*all* hearsay within hearsay--should properly be deemed sufficient or whether, to satisfy even the preponderance standard, at lease *some* evidence deemed reliable under the Rules of Evidence should be required.

3. The Petition raises a third question: whether the sole convictions were properly sustained in the first place, since these convictions--for extortion and extortion conspiracy--were upheld despite the "assumption" by the majority that one branch of the two-pronged charge did not properly state a Hobbs Act claim.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, United States of America, and Defendants-Appellants Aloi and Mangano (the petitioners herein) as well as one Dennis DeLucia. Named defendants were: VINCENT GIGANTE, VITTORIO AMUSO, ANTHONY CASSO, PETER GOTTI, DOMINIC CANTERINO, PETER CHIODO, JOSEPH ZITO, CAESAR GURINO, VINCENT RICCIARDO, JOSEPH MARION, JOHN MORRISSEY, THOMAS MCGOWAN, VICTOR SOBOLEWSKI, ANTHONY B. LAINO, GERALD COSTABILE, ANDRE CAMPANELLA, MICHAEL REALMUTO, GEORGE ZAPPOLA, RICHARD PAGLIARULO, MICHAEL DESANTIS, MICHAEL SPINELLI, THOMAS CAREW, and CORRADO MARINO.

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OPINION BELOW

The decision of the Court of Appeals affirming the conviction and sentence is reported at 39 F.3d 42 and is reprinted in App. at 11a-30a. The amended decision, denying rehearing but amending the decision, is reported at 94 F.3d 53 (2d Cir. 1996) and is reprinted at 2a-10a.

JURISDICTION

The amended decision (2a-10a) was entered on August 26,

1996. However, judgment denying rehearing was entered April 21, 1997 (1a). Jurisdiction is invoked under 28 U.S.C. §§1254(1) and 2101(c).

PERTINENT STATUTORY PROVISIONS

The pertinent portion of the Hobbs Act, 18 USC §1951, is reprinted at 31a.

STATEMENT OF THE CASE

After a six-month jury trial in the Eastern District of New York, petitioners Benedetto Aloi and Venero Mangano were each convicted of one count of conspiracy to commit extortion, and one substantive count of extortion (18 USC §1951). They, and a host of others, had been initially charged in an indictment that alleged the long-standing control, through extortion and labor racketeering by *four* "organized crime families", of the window replacement market in the New York area, and specifically, of contracts awarded by the New York City Housing Authority. Petitioners Mangano and Aloi were allegedly members of the administrations of the Genovese and Colombo "families" respectively. Defendants supposedly controlled the market by controlling which manufacturing companies would be permitted to bid on contracts and which installation companies successful bidders would use.

The only two counts on which petitioners were convicted charged extortion and conspiracy to extort Graham Architectural Products, Inc., a window manufacturing company. Both counts alleged two property rights extorted: (1) Graham's right to bid competitively on Housing Authority contracts, and (2) Graham's right to contract with window installation companies of its choice. The indictment, which

was submitted to the jury, also alleged that one of the means by which defendants extorted Graham of these rights was by "caus[ing] window installation companies to refuse to contract with Graham" —in other words, by inducing these third-party installers, not Graham, to refrain from entering into certain contracts.

At trial and on appeal, petitioners argued that this one basis of the charge did not state an offense because in this instance, the property was not taken *from* Graham with its consent induced through extortion, as the Hobbs Act (see 50a) requires ("... 'extortion' means the obtaining of property from another, with his consent [emphasis added], induced by wrongful use of actual or threatened force, violence, or fear", 18 USC §1951(b)(2)), but rather was taken from the window installers. This may have had an *effect* on Graham, petitioners argued, but did not constitute extortion of Graham.

While dissenting Judge Van Graafeiland agreed with this argument and would have reversed--a reversal which obviously would have left no offenses of conviction on which enhanced sentences could be imposed--the majority affirmed despite its assumption that petitioners' argument was correct, holding (25a.):

> Even assuming that ... [petitioners'] legal arguments are correct, the arguments fail on factual grounds because "the causing of window installation companies to refuse to contract" is not the same as causing all installation companies to refuse to contract. The evidence at trial showed that some installers remained beyond the conspirators' control. So long as the possibility existed that

> Graham might contract with some other installer, the defendants' conduct, in causing some installers to refuse to contact with Graham, was an extortionate use of economic pressure aimed at causing Graham to cease its attempts at competitive bidding.

The Sentencing Proceeding: Despite the acquittal of petitioners on 67 of the 69 counts of the indictment, including RICO allegations of "organized crime", the district judge granted the government's motion for an upward departure. First *purporting* to reject the government's argument that the defendants' supposed status in "organized crime" alone warranted an upward departure, the Court nevertheless stated that the Commission could not have adequately considered the circumstances of the case, which involved

> a real life picture of arrogant organized crime at its worst. This was a largely successful endeavor over its life span to penetrate an entire multi-million dollar market with the imposing weapon of a thoroughly corrupted union and its officials. Particularly imposing and formidable ... was the unholy union of three, eventually four, organized crime families that came together ... united by the expectation and eventually the realization of enormous returns of their collective criminal endeavors. [Court of Appeals App.1221].

Stating that these circumstances--circumstances that the jury seemingly rejected in acquitting petitioners of RICO--*were* an appropriate basis for departure but that it was difficult to determine how such a departure could be calculated

[App.1223], the sentencing court looked to what it termed an alternative basis for an upward departure: the supposed involvement of petitioners Mangano and Aloi in a conspiracy to murder witnesses.

As to these "facts", the court relied on essentially three witnesses, all of whom provided hearsay at best vis-a-vis petitioners: Peter Chiodo, a self-proclaimed Luchese Crime family captain turned government witness, testified at a trial held between petitioners' trial and sentencing proceedings, that he had been ordered by Vic Amuso and by Anthony Casso, identified respectively as the "Boss" and "Underboss" of the Luchese Crime Family, to kill one Morrissey (a named co-defendant here), a Luchese associate, in the summer of 1989. According to Chiodo, Amuso and Casso had explained to *him* that this murder contract was part of some "inter-family plan" to kill potential witnesses in the case. Chiodo testified: "They told me we had to do two guys, the Colombo family had to do one and the Genovese family one." Chiodo claimed that he had asked who the other targets were but was told by Casso that it was "none of [his] business"--that he should "just take care of Sonny". Chiodo testified that he in fact did kill Morrissey.

Chiodo also testified that Casso had told him (Chiodo) that "all this was because of...Pete Savino's cooperation with the government" (Court of Appeals App.217-25). Savino, who indeed became a government witness, had been, he said, a "Genovese associate". Savino and Chiodo both had claimed at trial that petitioner Mangano was the person primarily responsible for supervising Savino in connection with the Genovese "interest" in the window industry from 1984 through 1990. According to the government, there was also evidence that petitioner Aloi was a "key" Colombo family "player" in the window industry.

Neither Chiodo nor Savino implicated *either* petitioner Aloi or petitioner Mangano. To the contrary, Chiodo's testimony was solely that Luchese boss Amuso and underboss Casso had directed certain killings and had stated that it was pursuant to some plan.

The second of the three witnesses was one Alphonse D'Arco, a self-proclaimed former Luchese boss, who also described a directive from Luchese's Amuso. At the sentencing hearing, D'Arco thus said that in late summer 1989 he had been assigned by Amuso to arrange the murder of a window installer who was a potential witness. However, according to D'Arco, in late 1989 this same Amuso had instructed him to *suspend* the murder contract, supposedly due to an agreement between the "families" to avoid weakening chances for bail. D'Arco further testified that, after the unsuccessful attempt to murder defendant/witness Chiodo, two Luchese "soldiers" had informed D'Arco that they were going to attempt to move Morrissey's body to another location (Court of Appeals App.227-40).

None of these witnesses implicated either of the petitioners other than to say that they had been told by the Luchese boss and/or underboss that this had been an "inter-family" plot.

The only other "evidence" that some "family" other than the Luchese family had known anything about any such "plot" came from Salvatore "Sammy the Bull" Gravano. Gravano testified at petitioners' *Fatico* hearing that John Gotti, the Gambino "boss", had discussed the window investigation with him, Gravano, on several occasions after it became known that Peter Savino was an informant. Gravano said that *before* the arrests, Gotti had informed Gravano that unidentified

"people involved" had come to an agreement to "clean house" Gravano said that he understood this to include petitioners Aloi and Mangano, as well as co-defendants Amuso and Casso (again, the Luchese "boss" and "underboss").

Gravano offered that an agreement to kill witnesses in a case affecting members of administrations of various families could not occur without "touching base" with the administrations of those other "families"; he explained further that Gotti had informed him about the plan because of his own position at the time as "underboss".

Gravano also stated that he, Gravano, had expected to be arrested in the "windows case" because of his participation. However, he denied having himself been a participant in any plan to kill witnesses.

Gravano further testified that *after* the arrests in the case, Gotti had reported to him that the "people involved" had agreed to "suspend the contracts on the witnesses" (Court of Appeals App.642-658).

The defense argued that the evidence showed at best that any plan to kill witnesses was a plan of the Luchese family alone. The defense pointed out that the only evidence of any directive to kill had come from Amuso and Casso--the Luchese boss and underboss--and, in connection with the hearsay statements supposedly made by Amuso to Chiodo and/or D'Arco, noted that at Amuso's own trial, which came after petitioners' trial but before their sentencing proceeding, the prosecutors had argued that Amuso and Casso lied about reasons for ordering that people be killed. Moreover, the defense pointed out, if one were to credit D'Arco's testimony that the plan to kill had been rescinded still in 1989, then

Gravano's testimony established that Amuso (or his underboss Casso) was *still* urging Gotti to kill a potential witness *after* the supposed "inter-family" agreement was "shelved".

The defense also pointed out that no one said that petitioners Aloi or Mangano had agreed to participate in any plot to murder "windows" witnesses. Mr. Aloi was not mentioned at all. And, when asked directly about petitioner Mangano, Gravano had testified that Mr. Mangano had refused to murder Savino even though both Casso and Gravano had urged him to do so. Further, according to Gravano, Mr. Mangano had on two other occasions indicated *his* interest in not committing murders.[1]

Despite the *absence* of evidence of the participation of Mr. Mangano or Mr. Aloi, the sentencing court, deeming Gravano a "credible witness" (even though, he did not disclose his supposed knowledge of this "conspiracy" until 8 or 9 months after his cooperation), held that the "credible evidence ... in a variety of forms and formats ... established by at least a preponderance of the evidence that defendants [petitioners] Mangano and Aloi were members of a conspiracy to murder witnesses associated with the windows investigation". Gravano's testimony, according to the sentencing judge, was "corroborative evidence that the scheme to assassinate witnesses or potential witnesses in this investigation extended beyond the confines of the Luchese Family" in that Gravano's testimony "in large measure" had "conform[ed] with the testimony of Chiodo and D'Arco" (Court of Appeals App.1222-26). The sentencing court then observed:

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[1]Chiodo himself was shot twelve times after pleading guilty in the case. He testified that thereafter he became a government witness.

> [A]s a fact-finder in this, it all makes such sense. The death of Morrissey, the attempt to move his body, the decision to cool it, if you will, following the arrests, indeed anticipating, as was the case, protracted bail hearings. Indeed, this very case became embroiled in those hearings, and quite certainly, as the participants anticipated, if I had any information concerning that event, the outcome of those bail hearings would have been different, and the defendants would not have enjoyed the privileges of pre-trial and post-trial release.... There are any number of factors that in my view establish a compelling case that Mr. Mangano and Mr. Aloi were members of this conspiracy [Court of Appeals App. 1224-25].

Stating that he intended to exercise "restraint" because "this has not been a murder trial" (App.1256), the trial judge first added two levels for obstruction of justice pursuant to U.S.S.G. §3C1.1--which brought petitioner Mangano to an adjusted base level of 31 and Aloi to 30. The court then upwardly departed, noting a provision in the extortion offense guideline (U.S.S.G. §2B3.2(b)(4)(C)) calling for a six-level adjustment in cases involving permanent or life-threatening bodily injury (App.1258), ultimately sentencing petitioner Aloi to 200 months and petitioner Mangano to 188 months. According to the government's calculation (premised on adjustments already imposed before relying on uncharged/acquitted conduct, as discussed in the footnote),[2] the

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[2]At sentencing, the parties agreed that the applicable base offense level pursuant to U.S.S.G. §2B3.2(b)(6)(h) was 18. The court increased

actual departure amounted to an additional 3 levels for Mangano and 5 levels for Aloi. The real impact of the departures, however, amounted to *years*.

The Appeal: The Second Circuit initially affirmed in a divided opinion (11a-30a.), with Judge Van Graafeiland not reaching the upward departure issue, instead opining that one of the theories of extortion presented to the jury in the double-pronged charge was legally invalid. The majority upheld the convictions despite its "assumption" that petitioners' legal argument concerning the Hobbs Act convictions were correct, and also upheld the sentencing enhancements on the ground that a preponderance standard sufficed but that "at some point" the "weight of the evidence" is "a factor to be considered by a court with regard to both adjustments and upward departures". In the end, the panel held that the adjustment for obstruction was proper because the evidence was "overwhelming", and that the departure was "reasonable" because the evidence of petitioners' participation in the murder conspiracy was "compelling" (23a.).

Thereafter, in response to petitioners' request for rehearing, the Court of Appeals withdrew that portion of the decision discussing the upward departure and substituted a new

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petitioners' levels by 7 based on an "amount demanded" greater than $5 million. The court further increased Mr. Mangano's level by 4 levels as a "leader" and Mr. Aloi's level by 3 levels as a "supervisor or manager".

Thereafter the court looked to the acquitted and uncharged conduct, adding the two levels for obstruction of justice and the additional months by way of an upward departure based, the court said, on the participation in the conspiracy to murder witnesses.

version (2a.-10a.).[3] The Court stated that it was not "on the present record" reaching the "constitutional issue" raised by petitioners, which it described as the argument that as a matter of Due Process, "the lowest standard of proof should not serve as the basis for finding facts that then serve to increase sentences through adjustments or departures by substantial amounts ...."

The Court went on to say that it viewed the preponderance standard as but a "threshold basis for adjustments and departures," and that the "weight of the evidence, at some point along the continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures."

The substituted opinion nevertheless affirmed the "reasonableness" of the departure in this case on the basis of the sentencing court's statement that petitioners "had been shown by `at least a preponderance of the evidence' to have conspired to murder the witnesses", followed by the judge's statement that he found witnesses "who implicated Mangano and Aloi in the conspiracy ... credible", and that therefore the evidence was "compelling" (9a). The Court of Appeals concluded by approving "that" as "sufficient to satisfy the Guidelines requirement of reasonableness, and any applicable constitutional standard". It affirmed the departure to 188 and 200 months respectively, though (as the panel noted) the base offense level of the offenses of conviction was 18, which would

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[3]The Court stated: "The petition for rehearing in this matter has previously been denied by the panel. Further proceedings concerning the suggestion for rehearing in banc have caused the panel to reconsider the petition for rehearing ...."

have yielded a 27-33 month sentence.

REASONS FOR GRANTING THE WRIT

I. Because The Issue Is Plaguing And Will Continue to Swamp The Lower Courts In Innumerable Criminal Cases, This Court Should Decide The Issue Left Open In *Watts* -- Whether Acquitted Or Uncharged Conduct That Dramatically Increases A Sentence Must Be Proven By A Greater Burden Than The Preponderance Standard

As noted, in Watts, this Court left open the Constitutional issue whether a preponderance standard for sentencing suffices when, as here, the sentence resulting from findings based on uncharged and/or acquitted conduct "dramatically increase" the sentence such that the "tail" "wags the dog".

There is no doubt that this issue will not fade away. The Court should grant the writ to resolve it now.

II. This Court Should Grant The Writ To Enforce The Notion That Due Process Requires That There Be At Least *Some* "Admissible" Evidence Supporting An Upward Adjustment Or Departure In Order For Findings Resulting Such Enhancements To Meet Even A "Preponderance Standard"

This Court, in Watts, *supra*, upheld the sentencing use of acquitted conduct proven by a preponderance when (as noted in the footnote[4]) the use of such evidence did not "dramatically increase" the sentence, such as would constitute "a tail which wags the dog of the substantive offense" (to use the language of *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).) In neither of the two cases leading to the *Watts* decision was the quality of the evidence as poor as in this case; and the Court did not discuss the quality of evidence that must support the preponderance standard.

In this case, petitioners argued below that the entirely hearsay evidence here did not establish the "facts" on which the departure was based *even by a preponderance.* While the Court of Appeals concluded that the proof was sufficient, its willingness to accept hearsay upon hearsay upon hearsay, we

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[4]In one of the two consolidated cases, the court found by a preponderance that the defendant had possessed the guns in connection with the drug offense though he was acquitted of the "gun count", 18 USC §924(c), and added two points to his base offense level pursuant to U.S.S.G. §2D1.1(b)(1). In the second, the jury acquitted defendant of a narcotics offense involving five ounces of cocaine, though the transaction had been videotaped. The court added the quantity from that acquitted transaction by way of "relevant conduct".

suggest, does violence to the Due Process notion that sentencing must be based on *reliable* data.

While, as discussed in *Watts*, 18 USC §3661 codifies the "longstanding principle" that "sentencing courts have broad discretion to consider various kinds of information" without limitation,[5] it does not purport to authorize the acceptance of pure hearsay as sufficient support for *any* standard of proof. Due Process, we suggest, should not allow a sentence based on evidence of such shoddy quality.

This Court has not directly dealt with the *quality* of evidence that supports the "preponderance" standard. It is our submission that, though hearsay can certainly be *considered*, insofar there is "no limitation" on what a sentencing judge can consider, hearsay alone should not and cannot be deemed sufficient to support a finding that any fact--much less one that supports a "dramatic increase" in a defendant's sentence--is proven even by a preponderance.

Indeed, here, the levels of hearsay are astounding: While the government presented "evidence" that Amuso (and/or Casso) had supposedly told Chiodo and D'Arco about murdering witnesses, the "evidence" that Amuso supposedly had told Chiodo that the murder was part of an inter-family "plan" necessarily came from some other absent third party: after all, Amuso or Casso could be deemed to have known only *their* "decisions", not those of any other family "boss". No one

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[5]The statute reads: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

knows who supposedly "told" Amuso or Casso, before they spoke to Chiodo, that any plan had been "authorized" or agreed to by some other "family", such that it might be imputable to others.

And Gravano's testimony concerning what Gotti had told *him*--i.e., that he (Gotti) had understood that there had been some inter-family agreement later rescinded--also did not answer the question of just how Gotti had heard such "information."

If the rules of evidence applied, Gravano's testimony about what he "heard" from Gotti would be totally inadmissible. Indeed, so, too, would D'Arco's and Chiodo's testimony be insufficient to show that there was any "inter-family" "plan", because the *sources* of information concerning such alleged inter-family plan were never identified.

Rule 602 of the Federal Rules of Evidence states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

While as *Watts* declared, there is still no limitation on what a sentencing judge may *consider* in increasing a sentence, Due Process should require *at least some* evidence that would satisfy this Rule, because otherwise the risk of unreliable findings is too great even if the standard is the "preponderance" standard. The Advisory Committee Notes to Rule 602 thus indicate that the basis of this provision that a witness must have

actually observed the fact is a "'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information'".

While this Court thus has approved the use of uncharged or acquitted evidence to support a sentencing enhancement when proved by a preponderance, it has not discussed whether totally hearsay evidence is sufficient to sustain such a burden of proof under the Constitution. The Court should grant the writ to clarify the quality of evidence that must be found to support a finding under any standard.

III. The Writ Should Be Granted To Reinforce This Court's Rulings That, Where One Possible Basis Of Conviction Is Legally, As Opposed to Factually, Insufficient, A General Verdict Of Guilt Cannot Stand.

The Second Circuit majority *assumed* that petitioners' *legal* challenge to the Hobbs Act substantive and conspiracy convictions were correct, but nonetheless affirmed "on factual grounds". The majority's decision to sustain the convictions despite a showing that one of the bases of conviction was *legally* unsound should be reviewed by this Court, not only because the decision contradicts firmly established principles not only of the Second Circuit itself, but also of this Court, but also because the consequence here is so great: the government was able to argue for and obtain *greatly* enhanced sentences for these individuals against whom it failed to prove RICO and other serious offenses, only because of the two extortion convictions. Before the Court sanctions such a result, it should assure that the appellate courts adhere faithfully to precedent meant to assure that wrongful convictions will not be permitted.

Thus, in *Yates v. United States*, 354 U.S. 298, 332-33 (1957), this Court specifically considered the situation where one branch of a double-pronged charge was legally invalid. The Court held that where this situation exists, it is impossible to tell from a general verdict whether or not the jury convicted on an invalid legal theory, and the convictions must be set aside.

The Court elucidated the reason for the rule in *Griffin v. United States*, __ U.S. __, 112 S.Ct. 466, 474 (1991):

> Jurors are not generally equipped to determine whether a particular theory submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of a crime. When, therefore, jurors have bene left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

The majority decision reaches to circumvent these holdings. Dissenting Judge Van Graafeiland rightly concluded that the Hobbs Act definition of extortion --the obtaining of property from another, with his consent, induced by ... fear ..." (18 USC §1951(b)(2)--was not met by showing that Graham did not enter contracts because *window installation companies* were fearful of contracting and thus "consented" not to enter such contracts with Graham. See *United States v. Agnes*, 753 F.2d 293, 302 (3d Cir. 1985)(consent is "an essential element of Hobbs Act extortion"); *United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987)(en banc)(exploitation of "fear" is critical

element).

Because the Second Circuit, in allowing a conviction premised on a legally invalid theory (invalid in that it did not require a showing of the *victim's* consent and fear), so departed from established and binding law, and because the consequences of allowing the conviction here were monumental in that the government obtained a sentence for *acquitted* and *uncharged conduct* premised on conduct that did not establish the offense of conviction, this Court should grant the writ on this ground as well and reverse the convictions.

CONCLUSION

This Court should grant *certiorari* to decide whether there are instances when proof of acquitted conduct must rise above the preponderance standard -- the recurring question left open in *Watts* --and whether the evidence used here to "dramatically increase" the sentences suffices under a "clear and convincing" standard or, indeed, even under the preponderance standard.

July 1997

Respectfully submitted,

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APPENDIX

Order and Judgment Denying Rehearing - Entered April 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit. held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of April, one thousand nine hundred and ninety-seven.

USA,

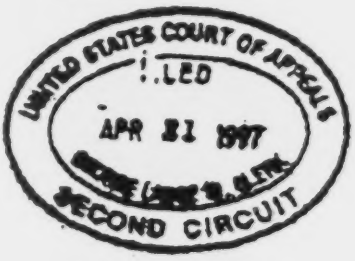
Appellee,

v.

Dkt. No. : 93-1260

Gigante, et. al.,

Defendants,



Benedetto Aloi, aka Benny,
Dennis Delucia and Venero
Mangano, aka Benny Eggs,

Defendants-Appellants.

Petitions for rehearing containing suggestions that the actions be reheard in banc having been filed herein by appellants, Benedetto Aloi, Dennis DeLucia and Venero Mangano

Upon consideration by the panel that decided the appeal, it is ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk
By: s/ Beth J. Meador,
Administrative Attorney

UNITED STATES OF AMERICA, Appellee, v. VINCENT GIGANTE, also known as "Chin"; VITTORIO AMUSO, also known as Jesse, also known as Vic; ANTHONY CASSO, also known as Gas, also known as Gaspipe; PETER GOTTI; DOMINIC CANTERINO, also known as Baldy Dom; PETER CHIODO; JOSEPH ZITO; CAESAR GURINO; VINCENT RICCIARDO, also known as Three Fingers; JOSEPH MARION, also known as Joe Cakes; JOHN MORRISSEY, also known as Sonny Blue, also known as Sonny; THOMAS MCGOWAN; VICTOR SOBOLEWSKI; ANTHONY B. LAINO; GERALD COSTABILE; ANDRE CAMPANELLA; MICHAEL REALMUTO; GEORGE ZAPPOLA; RICHARD PAGLIARULO; MICHAEL DESANTIS; MICHAEL SPINELLI; THOMAS CAREW; and CORRADO MARINO, Defendants, BENEDETTO ALOI, also known as Benny; DENNIS DELUCIA; and VENERO MANGANO, also known as Benny Eggs, Defendants-Appellants.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

94 F.3d 53; 1996 U.S. App. LEXIS 21945

August 26, 1996, Decided

PRIOR HISTORY: On petition for rehearing

defendants-appellants seek reconsideration of our affirmance of their convictions for extortion and conspiracy to commit extortion under the Hobbs Act. The petition for rehearing is denied. A portion of the previous opinion is vacated, and a new version substituted.

Amended Opinion of October 24, 1994, Reported at: 1994 U.S. App. LEXIS 30039.

COUNSEL: Judd Burstein, Marc Fernich, Judd Burstein, P.C., New York, New York, for Defendant-Appellant Benedetto Aloi.

Frederick P. Hafetz, Susan R. Necheles, Goldman & Hafetz, New York, New York, for Defendant-Appellant Venero Mangano.

JUDGES: Before: VAN GRAAFEILAND and WINTER, Circuit Judges, and POLLACK, District Judge. *

* The Hon. Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

[*55] ON PETITION FOR REHEARING

WINTER, Circuit Judge:

The petition for rehearing in this matter has previously been denied by the panel. Further proceedings concerning the suggestion for rehearing in banc have caused the panel to reconsider the petition for rehearing. The petition is once again denied, n1 but subsection (1) of the previous opinion is vacated and the following is substituted:

- - - - - -Footnotes- - - - - - - - - -

n1 Judge Pollack concurs in the denial of rehearing with opinion. Judge Van Graafeiland dissents.

- - - - - -End Footnotes- - - - - - - -

"DISCUSSION

1. The Upward Adjustments and Departures

Mangano and Aloi argue that the district court erred in adjusting upward the base offense levels and departing substantially upward from the Guidelines' suggested sentencing range based on conduct for which they had not been convicted. To support this argument they invoke the Supreme Court's suggestion of undefined "constitutional limits" on the extent a state's sentencing framework may entail upward departures based on unconvicted conduct lest that become "the tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 86-88, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). Mangano and Aloi rely upon our decision in *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), cert. denied, 510 U.S. 856, 114 S. Ct. 163, 126 L. Ed. 2d 124 (1993), in challenging both the practice of departing upward based on uncharged or acquitted conduct and the standard of proof used by the district court in assessing that conduct for sentencing.

Mangano and Aloi contend that the district court improperly required proof of the unconvicted conduct by a mere preponderance of the evidence rather than by clear and convincing evidence. They rely on a statement in a separate

opinion in Concepcion that, "a strong argument can be made that the 'clear and convincing evidence' standard should be used, at least for substantial enhancements." *Id.* at 394 (Newman, J., concurring). They further echo Chief Judge Newman's request for a review of this issue by the full court of this circuit. *Id.* at 395-96 (Newman, J., dissenting from denial of rehearing in banc).

As noted in both the opinion of the court and Chief Judge Newman's opinion in Concepcion, proof of unconvicted conduct by a preponderance of the evidence is a sufficient threshold basis for an upward departure. *Id.* at 390, 394. Concepcion, however, did not rely upon the preponderance standard because the district court had established the relevant conduct by clear and convincing evidence. *Id.* at 390. In the instant matter, Judge Dearie stated that he had "concluded that the credible evidence before the Court, in a variety of forms and formats, has established by at least a preponderance of the evidence that defendants Mangano and Aloi were members of a conspiracy to murder witnesses. . . ." Judge Dearie correctly understood the law of this circuit to be that unconvicted conduct may be relied upon to adjust a defendant's sentence level as contemplated by the Guidelines based on proof by a preponderance of the evidence. *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 182 (2d Cir.), *cert. denied*, 498 U.S. 844, 111 S. Ct. 127, 112 L. Ed. 2d 95 (1990); *United States v. Weinberg*, 852 F.2d 681, 685 (2d Cir. 1988).

In arguing that the extent of the departure was erroneous, Mangano and Aloi contrast the 27 to 33-month sentences indicated by the base offense level of 18 with Mangano's actual sentence of 188 months and Aloi's sentence of 200 months. They contend that this increase, based in part on

acquitted conduct, violated their rights to due process under the Fifth Amendment.

Appellants' argument is not without force. The preponderance standard is no more than a tie-breaker dictating that when the evidence on an issue is evenly balanced, the party with the burden of proof loses. *See United States v. Fatico*, 458 F. Supp. 388, 403 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073, 62 L. Ed. 2d 755, 100 S. Ct. 1018 (1980) ("Quantified, the preponderance standard would be 50+% probable."); *see also Nissho-Iwai Co. v. M/T Stolt Lion*, 719 F.2d 34, 38 (2d Cir. 1983); Leonard B. Sand et al., Modern Federal Jury Instructions P 73.01 at 73-6 (1993). Consequently, the danger of factual error would permeate a substantial upward departure based on a finding of, say, six uncharged crimes, each of which was proven only by a bare preponderance. See Edwin Mansfield, *Statistics for Business and Economics* 102 (5th ed. 1994). Appellants' constitutional argument is that the lowest standard of proof should not serve as the basis for finding facts that then serve to increase sentences through adjustments or departures by substantial amounts, particularly when the conduct is uncharged or has previously resulted in an acquittal. They argue that a higher standard of proof, such as clear and convincing evidence, ought to apply.

Our cases have followed the pre-Guidelines *Fatico* decision that factual issues need be proven only by a preponderance. *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090, 108 L. Ed. 2d 961, 110 S. Ct. 1833 (1990). Of course, in the pre-Guidelines era, the extent of judicial discretion was such that the sentence might be

racheted in a rough way upward or downward according to the weight of the evidence of uncharged or acquitted conduct. Indeed, a court had discretion to disregard such evidence entirely, even if proven. *See Fatico*, 579 F.2d 707, 713 n.14. A court also had the power to impose a very long sentence within the statutory maximum based on that uncharged conduct. *United States v. Fischer*, 381 F.2d 509, 511 (2d Cir. 1967), *cert. denied*, 390 U.S. 973, 19 L. Ed. 2d 1185, 88 S. Ct. 1064 (1968); *United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States v. Hodges*, 556 F.2d 366, 369 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978).

Courts have less discretion as to the range of sentences under the Guidelines. Moreover, in some situations it is mandatory under the Guidelines that they take uncharged conduct into account. *See United States v. Telesco*, 962 F.2d 165, 168 (2d Cir. 1992); *United States v. Vazzano*, 906 F.2d 879, 882 (2d Cir. 1990); U.S.S.G. § 1B1.3, comment. (backg'd.). Nevertheless, we believe that the preponderance test continues to govern, *United States v. Rivalta*, 892 F.2d 223, 230 (2d Cir. 1989), although we do not on the present record reach the constitutional issue raised by appellants.

In our view, the preponderance standard is no more than a threshold basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. With regard to upward adjustments, a sentencing judge should require that the weight of the factual record justify a sentence within the adjusted Guidelines range. In doing so, the Court may examine whether the conduct underlying multiple upward adjustments

was proven by a standard greater than that of preponderance, such as clear and convincing or even beyond reasonable doubt where appropriate. Where a higher standard, appropriate to a substantially enhanced sentence range, is not met, the court should depart downwardly. Because the risk of factual error in a series of adjustments, each of which involves conduct proven by a bare preponderance, is a circumstance present at least "to a degree" not adequately considered by the Commission, see 18 U.S.C. § 3553(b), a downward departure would be warranted. n2 *See United States v. Restrepo*, 936 F.2d 661, 666 (2d Cir. 1991); *United States v. Cotto*, 793 F. Supp. 64, 67 (E.D.N.Y. 1992); *United States v. Yellow Earrings*, 891 F.2d 650, 654 (8th Cir. 1989). We face no such situation in the instant matter, however. The adjustments for amount of loss, see infra, role in the offense, and obstruction of justice were based on overwhelming evidence. Even if [*57] appellants have the due process right asserted, therefore, the adjustments in question did not violate it.

- - - - -Footnotes- - - - - - - - - - -

n2 Generally, of course, a failure to depart downwardly is not appealable. *United States v. Colon*, 905 F.2d 580 (2d Cir. 1990). However, if the due process right asserted by appellants exists and the denial of a departure violated that right, the constitutional aspects of the denial would be appealable.

- - - - -End Footnotes- - - - - - - - - -

With regard to upward departures, the Guidelines require that they must be reasonable. *United States v. Stephenson*, 921 F.2d 438, 441 (2d Cir. 1990); *United States v. Palta*, 880 F.2d 636, 639 (2d Cir. 1989). In considering the

reasonableness of a departure, sentencing appellate courts should take the weight of the evidence into account. The reasonableness of substantial upward departures will depend in part on the standard of proof by which the conduct warranting the departure is established.

The present case nicely illustrates the process regarding upward departures. Judge Dearie began his analysis by stating that Mangano and Aloi had been shown by "at least a preponderance of the evidence" to have conspired to murder the witnesses. Noting that this was not a matter to be taken "lightly," Judge Dearie proceeded to analyze the testimony of the witnesses who implicated Mangano and Aloi in the conspiracy and why he found them credible. He then concluded, as do we, that the evidence was "compelling." That was sufficient to satisfy the Guidelines requirement of reasonableness, and any applicable constitutional standard. n3

- - - - - - - -Footnotes- - - - - - - -

n3 Mangano and Aloi contend that Judge Dearie erroneously included a "confluence of circumstances" involving organized criminal activity as an alternative basis for the upward departure from the Guidelines' recommended sentencing range. Judge Dearie mentioned the defendants' "status within their respective organizations, and their status within the bid rigging conspiracy, as opposed to the mere fact that they are members of organized crime groups," as well as the duration and extent of the conspiracy as factors constituting this "confluence." Mangano and Aloi argue that the Sentencing Commission already adequately considered these factors in calculating the Guidelines' ranges, that this departure impermissibly double counted factors taken into account in the three-level "role"

adjustment, and that the court improperly calculated the extent of the departure based on U.S.S.G. § 2B3.2(b)(4)(C).

These arguments are meritless. Judge Dearie relied primarily on Mangano's and Aloi's participation in the murder conspiracy, "itself a valid basis, indeed a compelling basis, to depart upwardly." Judge Dearie explicitly ruled out departure solely on the basis of organized criminal activity, stating "I know of no authority . . . to enhance or increase or even upwardly depart on the sole basis of membership in an organized criminal activity." Instead, he pointed to Mangano's and Aloi's status within their respective crime families and within the conspiracy, in addition to the breadth and duration of the conspiracy, to justify an upward departure. These criteria do not "double count" the defendants' "leadership role" in the conspiracy since Judge Dearie could in any case depart upward from that calculation because leadership in the conspiracy is not the same as leadership in organized crime. Moreover, the Guidelines explicitly authorize upward departure on the basis of organized criminal activity. U.S.S.G.§2B3.2, comm. (n.8).

---------End Footnotes------

UNITED STATES OF AMERICA, Appellee, v. VINCENT GIGANTE, also known as "Chin"; VITTORIO AMUSO, also known as Jesse, also known as Vic; ANTHONY CASSO, also known as Gas, also known as Gaspipe; PETER GOTTI; DOMINIC CANTERINO, also known as Baldy Dom; PETER CHIODO; JOSEPH ZITO; CAESAR GURINO; VINCENT RICCIARDO, also known as Three Fingers; JOSEPH MARION, also known as Joe Cakes; JOHN MORRISSEY, also known as Sonny Blue, also known as Sonny; THOMAS McGOWAN; VICTOR SOBOLEWSKI; ANTHONY B. LAINO; GERALD CONSTABILE; ANDRE CAMPANELLA; MICHAEL REALMUTO; GEORGE ZAPPOLA; RICHARD PAGLIARULO; MICHAEL DeSANTIS; MICHAEL SPINELLI; THOMAS CAREW; and CORRADO MARINO, Defendants, VENERO MANGANO, also known as Benny Eggs; BENEDETTO ALOI, also known as Benny; and DENNIS DELUCIA, Defendants-Appellants.

Docket Nos. 93-1260, 93-1277, 93-1278

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

39 F.3d 42; 1994 U.S. App. LEXIS 30039
October 25, 1993, Argued October 24, 1994, Decided

As Amended on Denial of Rehearing August 26, 1996,

Reported at: 1996 U.S. App. LEXIS 21945.

Appeal from a conviction by a jury for extortion and conspiracy to commit extortion under the Hobbs Act, 18 U.S.C. § 1951, and from an upward departure from the sentencing range recommended in the United States Sentencing Guidelines, U.S.S.G. §§ 2B3.2, 3B1.1, 3C1.1 and 5K2.0, entered in the United States District Court for the Eastern District of New York (Raymond J. Dearie, Judge). We hold that the preponderance of evidence standard applies to upward adjustments and departures under the Sentencing Guidelines and appellants' sentences do not violate due process.

DISPOSITION: Affirmed.

COUNSEL: GREGORY J. O'CONNELL, Assistant United States Attorney (Zachary Carter, United States Attorney, and David C. James, Charles E. Rose, and Kevin P. McGrath, Assistant United States Attorneys, Eastern District of New York, of counsel), for Appellee.

JUDD BURSTEIN, New York, New York (Marc Fernich, New York, New York, of counsel), for Defendant-Appellant Aloi.

FREDERICK P. HAFETZ, Goldman & Hafetz, New York, New York (Susan R. Necheles and Adam Thurschwell, Goldman & Hafetz, New York, New York, of counsel), for Defendant-Appellant Mangano.

ALAN FUTERFAS, Shargel & Futerfas, New York, New York, for Defendant-Appellant DeLucia.

JUDGES: Before: VAN GRAAFEILAND and WINTER, Circuit Judges, and POLLACK, District Judge. * Judge Van Graafeiland dissents in a separate opinion.

* The Honorable Milton Pollack, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

WINTER, Circuit Judge:

Venero Mangano, Benedetto Aloi, and Dennis Delucia appeal from their convictions by a jury before Judge Dearie for extortion and conspiracy to commit extortion in violation of 18 U.S.C. §§2 and 1951. The principal issue on this appeal arises from the facts that Mangano and Aloi had, after conviction, a base offense level that would have resulted in sentences of 27-33 months under the Guidelines, whereas, after adjustments in the levels and upward departures, many of which were based on uncharged or acquitted conduct, Mangano was sentenced to 188 months, and Aloi to 200. In calculating Mangano's and Aloi's sentences, Judge Dearie granted the government's motion for an upward departure, pursuant to U.S.S.G. § 5K2.0, from the sentencing range established in the United States Sentencing Guidelines on the basis of conduct for which Mangano and Aloi were not convicted. Mangano and Aloi appeal the upward departure as unreasonable, as based on other erroneous grounds, and as based on the wrong standard of proof. They further argue that the indictment underlying their convictions was legally improper and challenge their sentences for an improper calculation of the "amount demanded" by the extortion conspiracy. Delucia, who was sentenced to 46 months, joins in his co-defendants' appeals of their convictions and presses his own argument that the evidence against him

was legally insufficient and that his sentence was based on an erroneous calculation of the "amount demanded." We reject all these arguments and affirm.

BACKGROUND

We view the evidence in the light most favorable to the government. Mangano and Aloi were senior members of the administration of the Genovese and Colombo crime organizations, respectively. Beginning in 1978, they participated in a lucrative conspiracy to control the window replacement market in the New York metropolitan area, primarily through controlling the bidding on contracts with the New York City Housing Authority ("NYCHA"). Delucia, a senior or "made" member of the Colombo organization, joined the conspiracy in 1988. Through threats and acts of violence against window manufacturers, and through influence over a corrupt labor union, Local 580 of the Architectural and Ornamental Ironworkers Union ("Local 580"), responsible for supplying workers on window replacement contracts, Mangano, Aloi, Delucia, and their associates managed to rig many of the bids on those contracts, thus inflating the costs to the NYCHA. They then collected payments from the manufacturers.

[*45] Mangano, Aloi, and Delucia were convicted for the extortion of, and conspiring to extort, the window manufacturer Graham Architectural Products, Inc. ("Graham"). A manufacturer and supplier of windows to installers controlled by the conspirators, Graham attempted to bid for window installation contracts itself in 1982. Under direct threats from the conspirators and from Local 580 and other unions, Graham temporarily ceased to bid. In March 1985, Graham attempted

yet again to submit competitive bids but was once more thwarted by the conspirators' threats and pressure on installers. Further attempts by Graham to escape the conspirators' control led it to seek new installers, only to discover that they too were controlled by organized crime families, including the Gambino organization.

The conspirators frequently quarreled over which crime family would garner the profits from control of Graham. Mangano stated at a 1988 meeting that, "I feel Graham was mine from the beginning." Nonetheless, all the conspirators agreed to exert control over Graham. For instance, at a meeting in June 1989, attended by all the major conspirators, the conspirators and Savino discussed their policy of thwarting Graham's efforts to bid independently.

The conspirators were clearly aware of the illegality of their actions. Both Delucia and Aloi counseled their co-conspirators not to mention names, especially over the telephone. In discussing another co-conspirator, Mangano instructed Peter Savino, a government informant, to "make sure he ain't wired." Mangano warned the others to establish ostensibly legal rationalizations for their actions, "The rest has gotta be done [so] that when somebody comes with a microscope they gonna look at it, yous done everything legal and alright. No more of this fucking shit that you did over here." Aloi voiced his fear of apprehension, lamenting, "I don't want to go to jail for a hundred years." Finally, upon discovering that many of their incriminating conversations had been secretly recorded by Savino, one conspirator threatened Savino and told him, "You were seen with federal agents, rat mother-fucker."

Although a latecomer to the conspiracy, Delucia was

instrumental in its execution. Delucia, an assistant to Aloi, appeared at almost every meeting attended by Aloi and demonstrated his knowledge of and complicity in the scheme. Delucia thus revealed a grasp of the details of the conspiracy, including the arrangements for payments from the contractors and the planning of crucial meetings among the conspirators. Delucia set the stage for the key discussion of the suppression of competitive bids through union intervention at the "heavyweights" meeting of February 24, 1989, when he stated, "The reason for this meeting is this guy's gotta throw in . . . Sonny's gotta make this guy throw in back his bid so you wind up with it. . . ."

The conspirators were indicted on sixty-nine counts of RICO violations and the underlying extortion, mail fraud, and labor payoff crimes. At trial, Savino, a former associate of the Genovese crime organization, testified extensively about the conspiracy and verified secretly recorded conversations amongst the conspirators that had taken place over eighteen months in 1988 and 1989. The government also introduced the testimony of Russell Trout, the former president of Graham, who recounted the pressure from the conspirators to cooperate with the conspiracy. Peter Chiodo, a former captain in the Luchese crime family, testified regarding the bidding conspiracy, the extortionate exclusion of competitors, and the collection of pay-offs from window manufacturers. Mangano, Aloi, Delucia, and the crime families they represented, figured prominently in all of this testimony.

Mangano, Aloi, and Delucia were convicted on Counts 3 (conspiracy to commit Hobbs Act extortion) and 59 (Hobbs Act extortion) of the 69-count indictment. The Hobbs Act defines "extortion" as "the obtaining of property from another, with his

consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Count 59 charged the defendants with acts of extortion, referenced in Racketeering Act 84, in [**8] obtaining from Graham with its consent and by the wrongful use of fear its property. [*46] This property consisted of its right to bid competitively and contract freely for window installation contracts. Racketeering Act 84 set out two acts of extortionate conduct:

a. The causing of window installation companies to refuse to contract for the installation of Graham windows in NYCHA projects; and

b. The causing of Graham, its owners, officers and employees to fear economic injury by threatening to prevent and preventing the installation of Graham windows in NYCHA projects.

At a *Fatico* sentencing hearing, see *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), the government presented evidence that Mangano and Aloi conspired to murder potential witnesses following the revelation in 1989 that Savino had secretly taped the conspirators' conversations for eighteen months. Peter Chiodo, a captain in the Luchese crime family, had testified at trial that he had murdered John "Sonny" Morrissey on orders from the conspirators. After his guilty plea, Chiodo himself became the victim of the murder conspiracy and was shot twelve times in an unsuccessful attempt on his life. At the *Fatico* hearing, the government also presented several other witnesses who testified that further murders had been planned but that those plans were suspended to increase the defendants' chances for release on bail.

At sentencing, the parties agreed that the applicable base offense level pursuant to U.S.S.G. § 2B3.2 was eighteen. The district court then increased Mangano's and Aloi's sentences seven levels, pursuant to U.S.S.G. § 2B3.1(b)(6)(h), based on the greater than five million dollar loss inflicted as the "amount demanded." The court further increased their sentences, pursuant to U.S.S.G. § 3B1.1(a), based on the defendants' roles in the conspiracy, four levels for Mangano as a leader and three levels for Aloi as a "supervisor or manager." Finally, relying primarily on Mangano's and Aloi's participation in the murder conspiracy, the district court raised the offense levels by two for obstruction of justice pursuant to U.S.S.G. § 3C1.1, resulting in an offense level of 31 for Mangano and 30 for Aloi. Pursuant to U.S.S.G. § 5K2.0, the court granted an upward departure that corresponded to three levels in Mangano's case and five levels in Aloi's. Mangano received a sentence of 188 months, Aloi 200 months.

The district court increased Delucia's offense level from the original 18 by three levels to 21, pursuant to U.S.S.G. § 2B3.1(b)(6)(D), based on the "amount demanded" of $ 600,000, calculated as the difference between the rigged prices and competitive prices on a project re-bid after the indictment. This rendered a sentence of 46 months for Delucia.

DISCUSSION

1. The Upward Adjustments and Departures

Mangano and Aloi argue that the district court erred in adjusting the base offense levels and departing substantially upward from the Guidelines' suggested sentencing range based on conduct for which they had not been convicted. To support

this argument they invoke the Supreme Court's suggestion of undefined "constitutional limits" on the extent a State's sentencing framework may entail upward departures based on unconvicted conduct lest that become "the tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 86-88, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). Mangano and Aloi rely upon our decision in *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 163 (1993), in challenging both the practice of departing upward based on uncharged or acquitted conduct, and the standard of proof used by the district court in assessing that conduct for sentencing.

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As noted in both the opinion of the court and Chief Judge Newman's opinion in Concepcion, proof of unconvicted conduct by a preponderance of the evidence is a sufficient threshold basis for an upward departure. *Id.* at 390, 394. *Concepcion*, however, did not rely upon the preponderance standard because the district court had established the relevant conduct by clear and convincing evidence. *Id.* at 390. In the instant matter, Judge Dearie stated that he had "concluded that

the credible evidence before the Court, in a variety of forms and formats, has established by at least a preponderance of the evidence that defendants Mangano and Aloi were members of a conspiracy to murder witnesses...." Judge Dearie correctly understood the law of this circuit to be that unconvicted conduct may be relied upon to adjust a defendant's sentence level as contemplated by the Guidelines based on proof by a preponderance of the evidence. *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 182 (2d Cir.), *cert. denied*, 498 U.S. 844 (1990); *United States v. Weinberg*, 852 F.2d 681, 685 (2d Cir. 1988).

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Courts have less discretion as to the range of sentences under the Guidelines. Moreover, in some situations it is mandatory under the Guidelines that they take uncharged conduct into account. See *United States v. Telesco*, 962 F.2d 165, 168 (2d Cir. 1992); *United States v. Vazzano*, 906 F.2d 879, 882 (2d Cir. 1990); U.S.S.G. § 1B1.3, comment. (backg'd.). Nevertheless, we believe that the preponderance test continues to govern. *United States v. Rivalta*, 892 F.2d 223, 230 (2d Cir. 1989), although we do not on the present record reach the constitutional issue raised by appellants.

In our view, the preponderance standard is no more than a threshold basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. With regard to upward adjustments, a sentencing judge should require that the weight of the factual record justify a sentence within the adjusted Guidelines range. In doing so, the Court may examine whether the conduct underlying multiple upward adjustments was proven by a standard greater than that of preponderance, such as clear and convincing or even beyond reasonable doubt where appropriate. Where a higher standard, appropriate to a substantially enhanced sentence range, is not met, the court should depart downwardly. Because the risk of factual error in a series of adjustments, each of which involves conduct proven by a bare preponderance, is a circumstance present at least "to a degree" not adequately considered by the Commission, see 18 U.S.C. § 3553(b), a downward departure would be warranted. n1 *See United States v. Restreppo*, 936 F.2d 661, 666 (2d Cir. 1991); *United States v. Cotto*, 793 F. Supp. 64, 67 (E.D.N.Y. 1992); *United States v. Yellow Earrings*, 891 F.2d 650, 654 (8th Cir. 1989). We face no such situation in the instant matter, however. The adjustments for amount of loss, see infra, role in the offense, and obstruction of justice were based on overwhelming evidence. Even if appellants have the due process right asserted, therefore, the adjustments in question did not violate it.

n1 Generally, of course, a failure to depart downwardly is not appealable. *United States v. Colon*, 905 F.2d 580 (2d Cir. 1990). However, if the due process right asserted by appellants exists and the denial of a departure violated that right, the constitutional aspects of the denial would be appealable.

With regard to upward departures, the Guidelines require that they must be reasonable. *United States v. Stephenson*, 921 F.2d 438, 441 (2d Cir. 1990); *United States v. Palta*, 880 F.2d 636, 639 (2d Cir. 1989). In considering the reasonableness of a departure, sentencing appellate courts should take the weight of the evidence into account. The reasonableness of substantial upward departures will depend in part on the standard of proof by which the conduct warranting the departure is established.

The present case nicely illustrates the process. Judge Dearie began by stating that Mangano and Aloi had been shown by "at least a preponderance of the evidence" to have conspired to murder the witnesses. Noting that this was not a matter to be taken "lightly," Judge Dearie proceeded to analyze the testimony of the witnesses who implicated Mangano and Aloi in the conspiracy and why he found them credible. He then concluded, as do we, that the evidence was "compelling." Appellants' due process rights were thus not violated. n2

- - - - -Footnotes- - - - - - - - - - -

n2 Mangano and Aloi contend that Judge Dearie erroneously included a "confluence of circumstances" involving organized criminal activity as an alternative basis for the upward departure from the Guidelines' recommended sentencing range. Judge Deane mentioned the defendants' "status within their respective organizations, and their status within the bid rigging conspiracy, as opposed to the mere fact that they are members of organized crime groups," as well as the duration and extent of the conspiracy as factors constituting this "confluence." Mangano and Aloi argue that the Sentencing Commission already adequately considered these factors in calculating the Guidelines's ranges, that this departure impermissibly double counted factors taken into account in the three-level "role"

adjustment, and that the court improperly calculated the extent of the departure based on U.S.S.G. § 2B3.2(b)(4)(C).

These arguments are meritless. Judge Dearie relied primarily on Mangano's and Aloi's participation in the murder conspiracy, "itself a valid basis, indeed a compelling basis, to depart upwardly." Judge Dearie explicitly ruled out departure solely on the basis of organized criminal activity, stating "I know of no authority . . . to enhance or increase or even upwardly depart on the sole basis of membership in an organized criminal activity." Instead, he pointed to Mangano's and Aloi's status within their respective crime families and within the conspiracy, in addition to the breadth and duration of the conspiracy, to justify an upward departure. These criteria do not "double count" the defendants' "leadership role" in the conspiracy since Judge Dearie could in any case depart upward from that calculation because leadership in the conspiracy is not the same as leadership in organized crime. Moreover, the Guidelines explicitly authorize upward departure on the basis of organized criminal activity. U.S.S.G§2B3.2, comment. (n.8).

- - - - - -End Footnotes- - - - - - - - - -

[*49] 2. Validity of the Indictment

Mangano, Aloi, and Delucia ask for a new trial on the ground that Count 59 failed to state properly the indicted offense of Hobbs Act extortion and that Count 3 charging conspiracy was therefore also invalid. The indictment charged that Graham had been extorted of its property right to contract freely with window installers with Graham's consent. The defendants contend that Graham could not have been extorted since, under the Hobbs Act, extortion requires the consent of

the victim through force or fear. Under their theory, Graham had no need to consent to the deprivation of its right to contract freely since the defendants presented the company with a fait accompli. Rather than being extorted, they argue, Graham was merely robbed. *See People v. Hagen*, 212 A.D. 879, 208 N.Y.S. 235 (App. Div. 1925) (holding that taking of money by physical force is not extortion). Moreover, they claim, even if Graham did fear harm, that fear did not prompt any action relevant for Hobbs Act purposes because Graham's consent was superfluous. Because the jury convicted on Count 59 on the basis of the allegedly defective "right to contract with installers" charge, appellants argue that the entire count must fail and be remanded for a new trial.

Even assuming that their legal arguments are correct, these arguments fail on factual grounds because "the causing of window installation companies to refuse to contract," is not the same as causing all installation companies to refuse to contract. The evidence at trial showed that some installers remained beyond the conspirators' control. So long as the possibility existed that Graham might contract with some other installer, the defendants' conduct, in causing some installers to refuse to contract with Graham, was an extortionate use of economic pressure aimed at causing Graham to cease its attempts at competitive bidding.

3. Sufficiency of the Evidence Against Delucia

Delucia argues that the government adduced insufficient evidence to support his conviction. The evidence must of course be viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942), and, if any rational jury could have found the

essential elements of the crime, the conviction must be sustained. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *United States v. Chang An-Lo*, 851 F.2d 547, 554 (2d Cir.), cert. denied, 488 U.S. 966, 102 L. Ed. 2d 530, 109 S. Ct. 493 (1988). Delucia claims he was "extraordinarily ignorant" of the window installation conspiracy, pointing to several statements made during a key meeting of the conspirators on February 24, 1989. However, these statements, such as "I'm starting to learn all this now," and questions such as, "We're not the union . . . that installs windows?" are ambiguous at best. They hardly amount to denials of involvement and are belied by Delucia's own affirmative answer in responding to the question from a member of the Gambino crime family: "You know everything that's going on, right?" The record was thus sufficient to allow the jury to find that Delucia was thus a "knowing participant" in the conspiracy. *United States v. Young*, 745 F.2d 733, 763 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

4. Amount of Loss

Mangano and Aloi challenge the calculation of the $ 5 million "amount demanded" on which basis the district court made a seven-level increase in their sentencing offense levels pursuant to U.S.S.G. § 2B3.2(a). Delucia challenges the same calculation on the basis of the $ 734,000 portion of that amount attributable to the period of his participation in the window installation conspiracy. The district court defined the "amount demanded" for sentencing purposes as the conspirators' "ill-gotten gains," calculated as roughly 10% of the amount of the conspirators' successful bids for NYCHA contracts. Judge Dearie based this figure on the difference [*50] between the withdrawn bid on the Unity Plaza project and the conspirators'

rigged bid ($ 634,000) and on Trout's affidavit estimating the gross profits from NYCHA contracts.

Appellants claim that there was no "amount demanded" because there was no loss to Graham as the victim of the conspiracy, and that Graham in fact profited from its participation in the bid rigging. Appellants also assert that the evidence was insufficient to support the calculated amount. These arguments ignore that Graham was neither the sole "victim" nor the sole beneficiary of the conspiracy. The NYCHA lost millions of dollars by paying far higher than competitive prices for windows and their installation. That money did not just disappear. Although some went to Graham, most of the super-competitive portion went to the defendants.

Moreover, the evidence presented by the government was fully sufficient to sustain these calculations. The evidence before the court indicated that the average gross margin on an NYCHA contract was 10%. The court adopted this figure to determine the "amount demanded." For several reasons, this was an extremely conservative method to use to arrive at such an estimate. If 10% was the average margin for rigged and honest bids, the profits from the rigged bids would be higher. For the same reasons, Delucia is properly responsible for the share of these amounts incurred during the period of his participation in the conspiracy.

5. Miscellaneous

Defendants argue that the imposition of a seven-level enhancement violates the Ex Post Facto clause since U.S.S.G. § 2B3.2(b)(1) (Nov. 1988) only called for a six-level enhancement under the Guidelines in effect at the time of the

offense. See *United States v. Paccione*, 949 F.2d 1183, 1204 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3029 (1992). This argument is without merit. The defendants' offense extended beyond November 1, 1989, because the indictment issued on May 30, 1990. They were therefore properly sentenced under the November 1, 1989 Guidelines Section 2B3.1(b)(6)(H) specifying a seven-level increase. *United States v. Eisen*, 974 F.2d 246, 268 (2d Cir. 1992), cert. denied, 113 S. Ct. 1619 (1993) (conspirators correctly sentenced under November 1, 1987 Guidelines because conspiracy foreseeably extended beyond November 1, 1987).

The reference to U.S.S.G. § 2B3.2(b)(4)(C) of the extortion guidelines which specifies a six-level increase for victims sustaining bodily injury was not improper as a basis for calculating the extent of the departure. Judge Dearie referred to the "threatening undertone of some level of violence" throughout the conspiracy and to the murders that were planned and committed in the wake of its exposure. Although a district court must explain the grounds for the departure, it need not articulate the precise provision relied on as a referent for the extent of the departure. *United States v. Cervantes*, 878 F.2d 50, 54 (2d Cir. 1989) ("We do not require sentencing judges to 'incant the specific language' used in the Guidelines.") (*quoting United States v. DeLuna-Trujillo*, 868 F.2d 122, 124 (5th Cir. 1989)). n2

------Footnotes----------

n2 We do not consider Mangano's and Aloi's arguments based on the Supreme Court's decision in *Williams v. United States*, 503 U.S. 193, 117 L. Ed. 2d 341, 112 S. Ct. 1112, 1122 (1992). These arguments were raised for the first time in the

defendants' reply brief. Arguments may not be made for the first time in a reply brief. *N.L.R.B. v. Star Color Plate Serv.*, 843 F.2d 1507, 1510 n.3 (2d Cir.) (rejecting attempt to raise new issue in reply brief even though issue was raised in previous proceeding), *cert. denied*, 488 U.S. 828, 102 L. Ed. 2d 58, 109 S. Ct. 81 (1988); *see also Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 895, 100 L. Ed. 2d 896, 108 S. Ct. 2218 (1988) (refusing to evaluate an argument appellate court refused to consider because first raised in reply brief); *Lee v. Burkhart*, 991 F.2d 1004, 1010 n.4 (2d Cir. 1993) (declining to consider plaintiff's allegation raised for first time in reply brief).

- - - - - - -End Footnotes- - - - - - - -

We therefore affirm.

DISSENT: VAN GRAAFEILAND, Circuit Judge, dissenting:

To prove extortion under the Hobbs Act, the Government must prove that the defendant [obtained] "property from another, with his consent, induced by wrongful use of actual [*51] or threatened force, violence, or fear...." 18 U.S.C.§ 1951(b)(2). In the instant case, the district court, reading directly from the indictment, instructed the jury that the "extortionate conduct" charged against the defendants included "the causing of window installation companies to refuse to contract for the installation of Graham windows in New York City Housing Authority projects." Whatever it may be, this conduct was not extortion.

I therefore dissent. A general guilty verdict must be overturned if one of the possible bases for conviction is legally,

as contrasted with factually, insufficient. *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993).

18 USC § 1951 (1997): Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.